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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RENZO FRANCISCO EGUILUZ,

Defendant and Appellant.

B204810

(Los Angeles County  
Super. Ct. No. SA058161)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Robert P. O'Neill, Judge. Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C.  
Johnson and Robert M. Snider, Deputy Attorneys General, for Plaintiff and  
Respondent.

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Renzo Francisco Eguiluz appeals the judgment (order revoking probation) entered following a plea of no contest to assault with a semiautomatic firearm and his admissions that he personally used a firearm in the commission of the offense and committed the offense for the benefit of a criminal street gang. (Pen. Code, §§ 245, subd. (b), 12022.5 subd. (a), 186.22, subd. (b)(1)(A).)<sup>1</sup>

We reject Eguiluz’s claim of sentencing error and affirm the judgment.

## **FACTS AND PROCEDURAL BACKGROUND**

### *1. The underlying criminal case.*

Eguiluz was charged by complaint with two counts of attempted murder (§§ 664/187) in which he personally discharged a firearm (§ 12022.53, subd. (c)) and two counts of assault with a semiautomatic firearm. It was alleged that Eguiluz committed each count for the benefit of a criminal street gang.

#### *a. The incident of July 26, 2005.*

On July 26, 2005, at approximately 10:30 p.m., 10-year-old K.W. observed a Suburban occupied by four males. Two of the males jumped out. One of them fired several shots at a male standing near the front of K.W.’s residence. The male who fired the shots yelled, “where you from?” Two shell casings were recovered at the scene. K.W. identified Eguiluz as the shooter in a photographic lineup.

#### *b. The incident of August 11, 2005.*

On August 11, 2005, Troy Wilson told a Hawthorne police officer that Eguiluz and another male approached him on Cordary Avenue and asked where he was from. Wilson said he did not “bang” and continued walking. Eguiluz and his companion followed Wilson. Eguiluz had a handgun and his companion had a car club. Wilson heard two and possibly three shots fired in his direction and ran into his house. Wilson selected Eguiluz as the shooter in a photographic lineup.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

*c. Testimony of the gang expert.*

City of Hawthorne detective Mark Kirunchyk testified he knows Eguiluz from prior police contacts. Kirunchyk has stopped Eguiluz with other members of a criminal street gang which claims sections of Hawthorne and Lawndale. Eguiluz is a self admitted member of the gang. Kirunchyk opined the instant shootings were committed for the benefit of the gang. He believed these attacks constituted work being put in by Eguiluz's gang, which was trying to align itself with another gang after Eguiluz's gang had earned a Mexican Mafia credential.

*d. Mistrial.*

A jury was unable to reach a verdict on either count. The jury voted ten to two for guilty on each count.

*2. Plea bargain results in probation with a 20-year suspended prison term.*

On April 23, 2007, Eguiluz pleaded no contest to one count of assault with a semiautomatic firearm, admitted the personal use of a firearm and a criminal street gang enhancement and was granted probation for five years with credit for time served and a suspended prison term of 20 years. As a condition of probation, the trial court ordered Eguiluz to remove a tattoo of the name of his gang and to sign up for tattoo removal within two weeks.

At the hearing on the change of plea, the prosecutor noted Eguiluz agreed to plead guilty to one strike offense, as opposed to two, in exchange for a suspended 20-year prison term. The trial court noted Eguiluz had been in custody for 620 days and observed this was "a very rare offer in that the prosecution offered suspended time." The trial court questioned whether probation was appropriate. The prosecutor indicated the trial of the case exposed problems with one of the witnesses, Eguiluz had served a considerable amount of time and no one was injured in either of the charged shootings. In light of the issues in this case and the considerable suspended sentence, the prosecutor believed five years probation would be sufficient to protect the public. The prosecutor also noted Eguiluz was 17 years of age at the time of the underlying shooting incidents.

Defense counsel indicated he had recommended against a previous offer. However, counsel wanted to ensure that Eguiluz was not accepting the offer simply to get out of jail. Although there were problems of proof at trial, the jury voted 10-2 in favor of guilt. Defense counsel opined one problem Eguiluz faced in another trial was the visible tattoo of the name of his gang.

The trial court explained a violation of probation would result in the imposition of a 20-year prison term. Defense counsel indicated Eguiluz was determined to distance himself from the gang and his mother had expressed an intent to move to Florida. The trial court asked Eguiluz: “You understand that any violation of probation, no matter whether you think it’s a big deal or not, an arrest for any misdemeanor or felony, if a court finds you to be in violation – and it doesn’t have to be me. It could be any court – if a court finds you to be in violation and revokes probation without reinstating it, you will do 20 years in prison at 85 percent. Do you understand that?” Eguiluz responded he did. The trial court noted the prosecutor had offered this particular plea bargain 11 days earlier and Eguiluz had been able to consider the offer and discuss it with counsel.

Following Eguiluz’s plea, the trial court suspended execution of the 20-year prison sentence and granted probation. The trial court ordered Eguiluz to cooperate in the removal of the large tattoo on his back and ordered Eguiluz not to associate with gang members and to obey all laws. The trial court advised Eguiluz “the keys to state prison are in your hands. If you choose to use them, then that’s what will happen.”

### *3. Preliminary hearing on new case.*

In August of 2007, a new criminal complaint alleged Eguiluz’s commission of vandalism in violation of section 594, subdivision (a), with a criminal street gang enhancement, trespass and other offenses. The trial court summarily revoked probation and ordered the probation violation hearing to be heard simultaneously with the preliminary hearing in the new case.

a. *Vandalism.*

On July 31, 2007, at approximately 11:00 p.m., Hawthorne police officer David Gregor was on patrol in uniform with a partner in a marked police vehicle when he saw a silver vehicle parked in front of a building on Crenshaw Boulevard. Gregor saw Eguiluz finishing graffiti that covered nearly an entire city block, approximately 300 feet, the entire distance of the building from front to back. Most of the graffiti on the building was written in the same red marker Gregor observed Eguiluz using. As Eguiluz turned to walk from the graffiti, he made eye contact with Gregor then ran. When the officers tried to block his escape, Eguiluz jumped over the right fender of the police car. Gregor pursued Eguiluz on foot but lost sight of him.

The prosecutor offered into evidence 13 photographs of the graffiti.

b. *Trespass.*

Shortly after 11:00 p.m. on July 31, 2007, Ricky Tabarez went outside to lock the gate to the front yard of his home on Chadron Street in Hawthorne when he noticed someone under his car, which was parked inside the yard. Tabarez's father ordered the individual to come out and Eguiluz eventually "rolled out and stood up." Tabarez's father was holding Eguiluz at gunpoint and ordered him to stay where he was and put his hands up. Eguiluz refused to comply. Eguiluz began to approach Tabarez, then rushed for the gate. Tabarez struggled to stop Eguiluz from escaping. Eguiluz tried to climb the fence surrounding the property but got caught on the spikes on top of the fence. Tabarez was holding Eguiluz's legs when Tabarez's father fired the gun.

*c. Gang expert.*

Kirunchyk, the investigating officer and gang expert witness in the probation case, testified he is quite familiar with Eguiluz. Eguiluz is an admitted and active member of a criminal street gang. On August 9, 2007, a Hawthorne police officer searched the vehicle Eguiluz was in and found a notebook with extensive gang writing. Eguiluz was wearing a baseball cap which bears a letter that represents Eguiluz's gang. Kirunchyk opined the graffiti benefited the gang by claiming the area as gang territory.

*d. Held to answer and found in violation of probation.*

The trial court found sufficient evidence had been presented to hold Eguiluz to answer. The trial court also found Eguiluz in violation of probation.

*4. Sentencing on violation of probation.*

The trial court conducted a probation and sentencing hearing prior to trial of the new case.

The probation officer assigned to Eguiluz's case testified Eguiluz had reported to probation as directed, he attended the Job Corps and is on a waiting list for job training, he enrolled in the "Homeboys Industries" program to have his tattoos removed and he has attended two tattoo removal sessions. Eguiluz also enrolled in Centinela Valley adult school to work toward his high school diploma. The probation officer noted Eguiluz had a support group in his church and his mother and had taken some small steps towards rehabilitation. The probation officer indicated he would recommend reinstatement of probation.

However, on cross-examination, the probation officer admitted he was not aware the probation violation case involved the tagging of an entire city block or that Eguiluz resisted arrest when he was caught writing the graffiti and he assaulted a citizen after trespassing. The probation officer indicated possession of the notebook of gang writing would constitute a separate violation of probation. In light of all these additional facts, the probation officer testified, in his opinion, release of Eguiluz would jeopardize public safety.

Defense counsel requested reinstatement of probation. After detailing the equities of the situation, defense counsel urged the trial court, “if you are going to consider further imprisonment, I do not believe your honor is bound to give 20 years. There has to be a proportionate sanction. A suspended sentence can still be there with some time served.” The trial court responded, “Quite frankly, the options are either continued probation or 20 years.” Defense counsel indicated, “I believe that on continued probation you can still impose a jail sentence.” The trial court agreed it could “do that on the county level.” The trial court continued, “but the sentence is either probation to be continued, because I feel that’s appropriate, or the previously imposed 20 years. I don’t have the option to modify that.”

Defense counsel asked if the trial court had stated it could sentence Eguiluz to county jail. The trial court responded, “I could make a determination that continuing Mr. Eguiluz on probation would be appropriate in this matter. If I cannot find that would be appropriate, then the sentence will be 20 years.” When defense counsel argued such a term would not be proportionate to the violation of probation, the trial court indicated the 20-year term would be imposed for shooting at another individual, “not for tagging.”

The trial court found Eguiluz “continues to be . . . intimately and actively involved in gang activities. It goes beyond . . . tagging walls. It goes to the point of fleeing from the police, involving citizens during the course of the pursuit.” The trial court commended Eguiluz for participating in probation, but found his conduct placed the community at risk and noted that, at the time of the underlying shooting case, Eguiluz was on juvenile probation for assault. The trial court indicated it had reviewed the reporter’s transcript of the change of plea in the underlying case and found it demonstrated understanding of what Eguiluz was accepting and was required to do. The trial court found Eguiluz was not an appropriate candidate for probation and imposed the previously suspended term of 20 years in state prison.

## CONTENTIONS

Eguiluz contends the matter must be remanded for resentencing because the trial court may have misunderstood the scope of its sentencing discretion. Eguiluz claims the record does not reflect the trial court was aware it could impose substantial jail time as a condition of reinstated probation. The trial court similarly was unaware that it could have accepted Eguiluz's guilty plea in the new case and dismissed probation in the assault with a firearm case.

## DISCUSSION

### 1. *Relevant sentencing principles.*

“On revocation of probation, if the court previously had imposed sentence, the sentencing judge must order that exact sentence into effect . . . .” (*People v. Howard* (1997) 16 Cal.4th 1081, 1088.) However, *Howard* does not preclude the trial court from reinstating probation as opposed to ordering into effect a previously imposed sentence. (*People v. Medina* (2001) 89 Cal.App.4th 318, 321-323.)

“Defendants are entitled to sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that ‘informed discretion’ than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.” (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.)

Where a trial court imposes sentence without an accurate understanding of its sentencing discretion, remand for resentencing is appropriate. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 257.)



2. *The record does not support Eguiluz's assertion the trial court held the mistaken belief it lacked authority to impose a jail term upon reinstatement of probation.*

Eguiluz contends it is unclear the trial court understood it could reinstate probation on more punitive terms, such as a jail term. According to Eguiluz, although the trial court indicated “it could do that on a county level,” the trial court merely was inquiring of defense counsel whether additional jail time could be imposed.

A fair reading of the trial court's exchange with defense counsel regarding county jail demonstrates the trial court understood it could reinstate probation with additional jail time. The trial court did not indicate or imply that it lacked authority in this area. The reference to the county level reflect the trial court's understanding it could have imposed time in the county jail as a condition of reinstating probation.

In sum, the record reflects the trial court was aware it could impose county jail time as a condition of reinstating probation.

3. *Eguiluz did not plead guilty or no contest to the new case.*

Eguiluz also contends the trial court was unaware Eguiluz could have pleaded no contest to the new case and, based thereon, the trial court could have sentenced him to a prison term of up to seven years. The trial court then could have terminated probation in the assault with a firearm case. Eguiluz complains the trial court never considered this “third option,” which would have been more commensurate with the nature of the new case and would have addressed the risk to society Eguiluz posed. Eguiluz notes he had made progress on probation and he could have pleaded guilty to the new offenses without the consent of the People.

Eguiluz claims it cannot be said the trial court would not have availed itself of this option. He concludes that, because the trial court was unaware of the scope of its sentencing discretion, the matter must be remanded. (*People v. Belmontes*, *supra*, 34 Cal.3d 335, 348, fn. 8.)

However, absent a plea of guilty to the new charges, the trial court had no occasion to consider what sentence might be imposed on these charges. As Eguiluz observes, he could have pleaded guilty, rather than not guilty, to the new charges without the consent of the People. He did not. Thus, the trial court had no occasion to consider this “third option.”

**DISPOSITION**

The judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.